

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 30 1997

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

MM Docket No. 97-182

**COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**



Association of Local Television Stations, Inc.
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

October 30, 1997

No. of Copies rec'd
List ABCDE

029

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

RECEIVED

OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

MM Docket No. 97-182

**COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

The Association of Local Television Stations, Inc. ("ALTV") hereby submits the following comments in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding.¹ ALTV is a non-profit, incorporated association of local television stations.² ALTV's membership includes nearly 200 stations from every region of the country. Their ownership spans the continuum from local single station owners to large media conglomerates. Their interests range from those of nationally distributed "superstations" to those of small home shopping and "infomercial" stations. All of these stations now confront the exigencies of converting to digital transmission. All will bear the considerable expense of constructing new transmission facilities and concurrently programming both their analog and digital facilities. All will face the substantial risks of offering a new service to a viewing public which may or may not

¹FCC 97-296 (released August 19, 1997)[hereinafter cited as *Notice*].

²"Local television stations" as referred to herein include not only truly independent stations, but also local television stations affiliated with the Fox, UPN, and WB networks.

respond favorably. All will face the compounded fractionalization of the television audience while today's local television stations offer an additional service or services via their new digital facilities. Local television stations, therefore, have an enormous interest in avoiding any unnecessary or arbitrary cost in making the transition to digital television.

This proceeding focuses on an area fraught with considerable potential for the imposition of just such arbitrary and unnecessary costs on local television stations -- local zoning and land-use restrictions which might impede siting, construction, and placement of broadcast transmission facilities. Much more is at stake than the parochial interests of local television stations. As the Commission correctly states, rapid development of digital television serves vital public interests.³ The Commission, therefore, has set out to "define those circumstances in which it may be necessary to preempt state and local regulations in order to achieve the benefits of a rapid roll-out of DTV."⁴ ALTV commends the Commission for going forward despite the obvious potential for controversy in some quarters.

ALTV fully supports the proposed rule submitted by the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV").⁵ The proposed rule would assure prompt and sound decisions by local authorities in their consideration of zoning and land use permits for broadcast facilities. It would assure that inordinate delays and groundless decisions by local authorities not frustrate the legitimate plans of local television stations to construct new digital television facilities in accord with the Commission's digital build-out schedule. At the same time, ALTV sees the proposed rule as no effort to demonize or dispense

³Notice at ¶10.

⁴Notice at ¶11.

⁵See Notice at Appendix B.

with local zoning and land use regulation. Local authorities would be left with ample authority to protect valid local concerns relating to siting, construction, and placement of new digital television facilities (as well as other broadcast facilities). Therefore, ALTV offers its support for the rule proposed by NAB and MSTV.

ALTV understands that NAB and MSTV will be submitting comments in further support of their proposed rule. ALTV has no wish to burden the Commission with duplicative showings or redundant arguments and, therefore, wishes to focus herein on several particular points, as follows:

- **Inordinate Delays and Arbitrary Decisions Burden the Commission's Processing Lines**

Decisions by local land use and zoning authorities, when arbitrary or delayed, stifle efficient processing of applications. When a station files an application for new or modified facilities, it must certify that it has a reasonable assurance that its proposed transmitter site will be available to it.⁶ Such a "reasonable assurance" may exist even where local authorities have yet to grant final zoning approval for use of the site by the station.⁷ Consequently, stations may (and often do) submit their applications while zoning and land use questions remain pending before local authorities. Indeed, the application may be granted by the Commission in the absence of final zoning and/or land use approval by local authorities. Thus, a station may be awarded a

⁶See FCC Form 301, Section VII, Questions 2 & 3.

⁷The Commission will not question an applicant's specification of a particular site based on concerns about zoning or land use approval "absent a 'reasonable showing' that the applicant will be unable to obtain approval of his plans from local authorities." *Radio Ridgefield, Inc.*, 47 FCC 2d 106, 109 (Rev. Bd. 1974).

construction permit for new or modified facilities well prior to its receiving all necessary clearances from local zoning and land use authorities.

However, once its application is granted a station has only a limited period of time in which it must construct its facilities.⁸ In the case of a new digital facility, the Commission's transition schedule places a greater premium on avoiding construction delays.⁹ Nonetheless, unless and until local land use and zoning authorities approve the station's proposed site, the station may do little more than sit on its permit from the Commission.

Moreover, in the absence of a prompt decision by local authorities approving the station's site, the Commission's staff is likely to be faced with processing additional applications from the station. First, if the delay in gaining local approval appears in danger of exceeding the allowed construction period, then the station must file for an extension of its construction permit. Such applications are routine to be sure, but they do impose additional burdens on the station and the Commission staff.¹⁰ Second, if the local authorities fail to approve the station's proposed site, then the station must file an application to modify its construction permit to specify a new site.¹¹ This is akin to going back to square one. Again, station and staff resources must be diverted to this

⁸See §73.3598 of the Commission's Rules and Regulations, 47 CFR §73.3598 (1996).

⁹See, e.g., *Notice* at ¶2.

¹⁰A prompt decision, on the other hand, often would enable stations to amend their pending applications prior to grant. Whereas this might introduce some additional delay into the processing of the original application, the need to file additional applications (and pay additional processing fees) would be avoided.

¹¹Alternatively, if the station considers the local authorities' decision improper or unlawful, it may pursue the appropriate avenues of appeal -- adding more delay and uncertainty to the process and, perhaps, requiring the filing of multiple applications for continuing extension of the station's construction permit.

additional application. Depending on the timing of the "mod" application, the station also may face filing an application to extend its construction permit so that it will not expire before it is modified. Thus, both the station and the Commission staff would be faced with preparing, reviewing, and processing additional applications simply because a local land use authority dawdled over its agenda or reached an arbitrary decision denying the station zoning or land use approval for its site.

By limiting the amount of time which local authorities would have to reach decisions on stations' zoning and land use applications and restricting local authorities to matters of legitimate local concern, the NAB/MSTV proposal would go far toward preventing the needless burdens of additional applications on stations and the Commission's processing staff.

- **The Rule Should Apply to All Broadcast Facilities**

ALTV submits that the rule should apply to local consideration of zoning and land use issues involving any and all broadcast facilities. It should not be limited to new digital television facilities during the ongoing transition. Concerns specific to the construction of new digital facilities are simply a species of the *genus* broadcast applications, none of which are immune from difficulties arising from dilatory processing of or arbitrary decisions involving zoning and land use clearances for new or modified broadcast facilities. The same harms are attenuated; the same basic interests are served. First, as noted above, overburdening the Commission's processing lines is avoided. Second, problematic questions of whether a new broadcast facility is somehow related to the need to construct digital facilities are avoided. Third, the basic public interest in prompt initiation of improved broadcast service is furthered. Fourth, greater spectrum efficiency is promoted.

Furthermore, as a practical matter, once the initial transition to digital is underway, many digital stations may be seeking to upgrade their new digital facilities. This presents a matter of

special concern to ALTV. Many analog UHF stations have been assigned UHF digital facilities with minimal power levels.¹² Their licensees will be particularly anxious to improve their facilities as quickly as possible. This will generate another round of applications to upgrade facilities. These upgraded facilities should be accorded the same treatment as new digital facilities. They will be just as crucial to the successful roll-out of digital television as the initial applications from these so-called U-to-U stations.¹³ Indeed, considerable concern exists among many UHF analog licensees that their successful transition to digital depends on their ability to improve their facilities as quickly as possible.¹⁴ Therefore, restricting the proposed rule to new DTV facilities arbitrarily would exclude a class of facilities applicants whose fate will have a profound impact on the hoped-for rapid roll-out of digital television.

Also as a practical matter, the application of the rule to analog facilities hardly would have wide effect. Few analog stations are likely to modify facilities. Few new analog stations are likely to be built. Therefore, the Commission would not be expanding the scope of the rule widely in terms of actual application if all new and modified broadcast facilities were protected by the preemption rule.

Finally, local station licensees are likely to be judicious in site selection for new digital facilities. Whereas they will be subject to technical constraints (and, indeed some may have to push the envelope to locate their facilities properly), no local station will wish to force the issue and

¹²See Petition for Reconsideration, MM Docket No. 87-268, filed June 11, 1997, by ALTV.

¹³As the Commission need not be told, the majority of analog television stations in this country are uhF stations.

¹⁴See, e.g., Petition for Reconsideration, MM Docket No. 87-268, filed June 13, 1997, by Sinclair Broadcast Group, Inc.; Petition for Partial Reconsideration of the Fifth Report and Order and of the Sixth Report and Order, MM Docket No. 87-268, filed June 13, 1997, by Viacom, Inc.

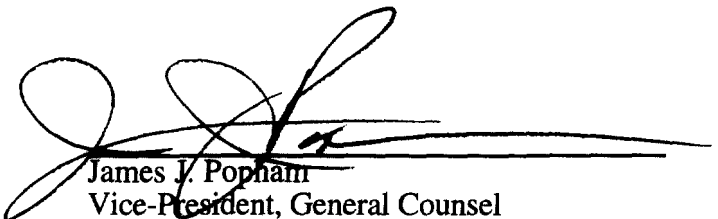
alienate local authorities unless they are pushed into a corner by imposing technical constraints or unique local circumstances. Local television stations thrive on their local service and goodwill. They often work closely with local authorities in seeking to address issues of concern and improve life in their communities. They have no incentive whatsoever to poke local authorities in the eye with provocative land use proposals, while attempting to hide behind the cloak of federal preemption. Thus, again, the actual impact of the rule will fall well below its theoretical potential for federal intervention in local decision making.

The pre-emption rule, therefore, should apply to all broadcast applications.

- **Conclusion**

In view of the above, ALTV urges the Commission to adopt the rule proposed by NAB and MSTV.

Respectfully submitted,



James J. Popham
Vice-President, General Counsel

**Association of Local Television
Stations, Inc.**
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

October 30, 1997

